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FILE: [REDACTED]
SRC 08 109 51950

Office: TEXAS SERVICE CENTER Date: APR 29 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner, a non-profit charitable private foundation that exists to fund the Roskamp Institute in Sarasota, Florida, seeks to employ the beneficiary as a research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Chief Operating Officer of the petitioning entity, describes the Roskamp Institute and the beneficiary’s work there:

The Roskamp Institute is recognized worldwide as one of the top institutions in Alzheimer’s research. . . .

We wish to offer [the beneficiary] the position of Research Associate. As a Research Associate Professor [*sic*], [the beneficiary] will be responsible for anesthesia, controlled cortical impact procedure, tail clipping for DNA preparation and genotyping, perfusion and dissection of the mouse colony. . . .

[The beneficiary] is also charged to display and analyze proteins from diverse sources, including human serum and plasma, as well as homogenous cell culture issue through the drug addiction and gulf war syndrome program. In addition [the beneficiary] used microarray analysis to determine the genomic response to agents used in the Gulf War. [The beneficiary] will continue to be up to date on the latest approaches to genomic and proteomic data analysis. He will be responsible for interacting with scientists at the James Haley Veterans Hospital and maintaining the mice colony in the Tampa Veteran Hospital. . . .

[The beneficiary's] past research has been involving the following areas of interest:

- Marine sponge derived microorganism.
- Identification of DNA from fossilized plant material recovered from Peruvian Lake sediment cores. . . .

[The beneficiary's] current research has been involving the following areas of interest:

- Gulf War Syndrome.
- Mechanisms of drug addiction.
- Traumatic Brain Injury (TBI). . . .

[The beneficiary] has proven to be an asset to the entire research team with his competency to perform many different tasks simultaneously. [The beneficiary] has not only highly regarded understanding of research methods but also has the ability to collect and monitor data and present the findings in an effective, concise manner. [The beneficiary] has superior skills working with databases, spreadsheets, and word processing programs. . . . He has far exceeded others in his similar role. . . .

It is clear that without the skills and unique expertise that [the beneficiary] brings to the United States, his absence will result in major delay in our understanding and treatment for TBI, drug addiction and the gulf war syndrome.

Several witness letters accompanied the initial submission.
Florida Institute of Technology stated:

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[The beneficiary] worked in my laboratory as an undergraduate research scientist beginning in August 2003. He developed techniques to analyze fossilized plant DNA recovered from lakebed samples. . . . What is exciting about this work is that the information about the identified species can be used to determine what the surrounding flora looked like of geological time periods (tens of thousands of years). This can be

extrapolated to determine what the regional climate was like, and thus, gain information about long-term climate change.

[REDACTED] of Nova Southeastern University stated:

We first met when [the beneficiary] applied to be my summer intern in the Harbor Branch Oceanographic Institution (HBOI) summer internship program. . . .

[The beneficiary's] project involved the complex analysis of gene transcripts from a marine sponge derived microorganism. Our laboratory . . . has been focused on finding new medicines from marine resources and organisms. To do this, [the beneficiary] learned and applied the mRNA differential display method to study different patterns of gene expression from microbes which may be producing potentially useful or therapeutic natural compounds. [The beneficiary] was excellent with the benchwork and molecular biology methodology, which was non-trivial, and he also very nicely wrote up a final report and presented the work in a public seminar forum to complete the internship.

Turning to the beneficiary's more recent research, [REDACTED] Chief of Pathology and Laboratory Medicine at Bay Pines Veterans Affairs Healthcare System and a clinical assistant professor at the University of South Florida (USF), stated:

I have known [the beneficiary] for ten years, and first met him while he was completing his secondary studies in France. . . .

He has worked to help identify specific molecular mechanisms underlying the Gulf War Syndrome. . . . [The beneficiary's] involvement with research pertaining to Gulf War Syndrome may one day be part of the treatment program for our ailing Veterans.

[The beneficiary] has contributed to the investigation of biomarkers of drug addiction. He uses the proteomics approaches to explore the brain's response to exposure to addictive drugs, such as cocaine. . . .

[The beneficiary] has also played a key role in a Traumatic Brain Injury (TBI) research program. He has direct responsibility for the preparation, processing and analyzing the tissues samples, in research to develop pharmacotherapeutic solutions to TBI.

[REDACTED], a research biologist at the James A. Haley Veterans Hospital, Tampa, Florida, stated:

[The beneficiary] presently assists our efforts by providing, among other things, integration services between the Roskamp Institute and the James A. Haley Veterans Administration Medical Center in Tampa. . . .

[The beneficiary] has participated in multiple research projects at the Institute, including two very important projects under the direction of [REDACTED], one of which deals with investigating biomarkers and mechanisms of drug addiction. The other project deals with Traumatic Brain Injury (TBI). His presence at the Veteran Hospital is indispensable as he is in charge of the mice colony used to study TBI. . . . [The beneficiary's] involvement at the VA facility is growing and exposing neuronal cells to Pyridostigmine Bromide, a nerve gas protectant which was widely used by veterans in the first Gulf War. . . . [The beneficiary] is in the development stages [to] determine treatment programs for the Gulf War Syndrome victims. His knowledge . . . regarding the Gulf War Syndrome cannot be readily replaced.

[REDACTED] Director of the Roskamp Institute and a neuroscientist at the James A. Haley Veterans Hospital, stated that the petitioner "is primarily responsible for leading the program to finding a treatment for Gulf War Syndrome." Regarding drug addiction research, [REDACTED] stated that the beneficiary's "contribution to finding the correlation of the brain and addiction is invaluable."

Associate Director of the Roskamp Institute and a former USF Associate Professor, stated:

[The beneficiary] was initially employed at the Institute in early 2006 to work on a three year Veterans Administration grant to research mechanisms underlying Gulf War Syndrome. His work . . . is currently revealing genes and proteins responding when human neurons are exposed to Pyridostigmine Bromide – the nerve gas protectant which was widely used by veterans in Gulf War 1991. . . .

Another program to which [the beneficiary] contributes is the research under my contract with the Counterdrug Technology Assessment Center of the Office of National Drug Control Policy. . . . We have discovered that human neurons exhibit significant immune and inflammatory responses to cocaine exposure, as well as showing evidence for increased oxidative stress. . . .

In September 2007 I was awarded a \$1.5M contract from the Department of Defense for the exploration of Traumatic Brain Injury (TBI) at the proteomic level. [The beneficiary] contributed both to the preliminary data (manuscripts in preparation) and the research and writing of this proposal, and is named as an investigator. This project will investigate the mechanisms through which APOE genotype contributes to recovery after TBI. . . .

In addition to his work on preparation and analysis of tissue samples from the mouse models of TBI it is he who performs the surgery to administer injury (or sham injury) to all of the mice in our many ongoing studies. . . . In addition to identifying novel targets for therapeutic intervention, we already have generated data to implicate the amyloid

protein as contributing to the detrimental processes incipient after TBI and have a pipeline of novel anti-amyloid drugs which we will be testing *in vivo*.

These vital programs would be significantly negatively impacted if [the beneficiary] were unable to continue his work.

██████████ a Scientist at the Roskamp Institute, collaborates with the beneficiary under ██████████ supervision. ██████████ stated that the beneficiary "is one of only two researchers at the Institute with the expertise to administer TBI to our research animal population." ██████████ had indicated that the beneficiary "is . . . currently training technicians in this technique.")

The above letters tend to focus on the beneficiary's mastery of specialized laboratory techniques, rather than on the beneficiary's findings or on investigations begun on the beneficiary's own initiative.

The petitioner submitted copies of various technical writings, mostly in manuscript form, co-authored by the beneficiary. The initial submission did not document the impact, if any, of these writings.

On June 24, 2008, the director issued a request for evidence instructing the petitioner to submit more information regarding the beneficiary's "precise role" in his various projects, and evidence regarding the impact that the beneficiary's work has already had on medical treatment of Gulf War Syndrome, drug addiction, and TBI. The director requested documentation showing that other researchers have cited the beneficiary's published work.

The petitioner's response to the request did not include any documentary evidence. Instead, the petitioner submitted five more witness letters. Former U.S. Senator William E. Brock, now a senior advisor to the Roskamp Institute, stated: "finding quick answers to the tragic consequences of traumatic brain injury for our troops is a substantial US priority." This is not in dispute. At the same time, however, an alien researcher does not qualify for a national interest waiver simply by engaging in TBI research. Substantial intrinsic merit is a necessary, but not sufficient, qualification for the waiver.

Sen. Brock, like many prior witnesses, described the beneficiary's duties, stating that the beneficiary is "critically involved in the subsequent dissection and protein preparation, cognitive testing, data analysis, etc." Sen. Brock asserted that the beneficiary "is solely responsible for all of the surgeries on the mice in ALL the TBI work." ██████████ had previously asserted that the beneficiary "is one of only two researchers at the Institute with the expertise to administer TBI to our research animal population." If these two claims do not exactly contradict one another, ██████████ nevertheless indicated that the beneficiary is not the only researcher at the Institute who is capable of performing the TBI procedure on mice. Even if the beneficiary were the only person currently at the Roskamp Institute qualified in the procedure, it would not mean that other qualified workers cannot be found elsewhere. And if we assume that the beneficiary is simply the only person available to perform this work, and this ability is, in turn, a minimum qualification for the job that the beneficiary holds, then the labor certification process would yield a finding that no minimally qualified U.S. workers are available. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not

inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221.

With respect to existing clinical implementation of the beneficiary's work, Sen. Brock stated "this is a relatively new area of research." Rather than identify any existing uses of the beneficiary's findings, Sen. Brock observed that "this team has already demonstrated their capability to successfully translate basic research into clinical testing in other neurodegenerative conditions." Sen. Brock appeared to state, in other words, that the Roskamp Institute has tested treatments for other conditions, and so it can be assumed that the beneficiary's research will eventually follow the same course.

U.S. Representative Kathy Castor listed the human and economic costs of TBI and Alzheimer's disease, once again attesting to the uncontested intrinsic merit of the beneficiary's area of research. Rep. Castor said little about the beneficiary specifically, except that the beneficiary's "skills are in very high demand. His expertise in this field cannot be replaced."

██████████, Chief Scientist and Neuroscience Portfolio Manager at the U.S. Army Telemedicine and Advanced Technology Research Center, Fort Detrick, Maryland, explained what the Army hopes to learn from the TBI studies in which the beneficiary participates. ██████████ argued that, if the beneficiary had to be replaced, the training of his replacement would delay the project's progress.

██████████ in her second letter, stated that the beneficiary "is now the sole TBI surgeon in our Institute"; she did not specify what happened to the other qualified TBI surgeon to whom ██████████ had previously referred. ██████████ stated that the beneficiary's role in the research is "to manage the colony of APOE transgenic mice"; perform necessary surgery on the mice ("up to 12 such surgeries in a day"; euthanize the mice and collect tissue samples; "process the dissected tissue," "upload the datasets of differential proteomes . . . to identify the molecular mechanisms predicted to be impacted by the observed protein changes"; and "specifically interrogate tissue samples for specific proteins to validate the [molecular] pathways." ██████████ provided little information about the beneficiary's work apart from a technical description of his laboratory duties.

██████████ estimated "a 15-20 year timeline" from the initiation of research to the first clinical studies, and stated that the beneficiary's projects "are at the earliest stages." She did not indicate whether the beneficiary's involvement would be required through that entire period. The beneficiary has stated his intention of pursuing a doctoral degree, and because the petitioner is not a degree-granting institution, his studies would necessarily require him to turn his attention elsewhere.

██████████, a Clinical Research Psychiatrist at Defense and Veterans Brain Injury Center, Tampa, Florida, previously collaborated with ██████████. Dr. ██████████ stated that the beneficiary "is directly contributing to the success of [the Roskamp Institute's] programs through his surgical skills and also his technical expertise in protein manipulation." ██████████ added that the beneficiary's future efforts "will clearly be instrumental" when the projects advance to later stages.

The director denied the petition on September 10, 2008, stating: “The issue in this case is not whether the alien’s field of employment is in the national interest, but rather whether this particular beneficiary, to a greater extent than U.S. workers having the same minimum qualification[s], plays a significant role in the furtherance of that field.” The director concluded that the petitioner had not established that the beneficiary’s accomplishments exceed those of other researchers qualified to do comparable work.

Counsel, on appeal, asserts that the beneficiary’s “contributions and skill set are virtually irreplaceable because he functions as the sole surgeon in the Roskamp Institute who is able to administer TBI in the research mice.” Leaving aside the somewhat inconsistent statements about how many workers at the Roskamp Institute are qualified to administer TBI to mice, counsel assertion that the beneficiary is the only qualified “surgeon in the Roskamp Institute” begs the question of why the beneficiary would have to be replaced by someone else already at the Roskamp Institute. The record is silent as to the availability of qualified surgeons who do not yet work at the Roskamp Institute. We note, furthermore, that the beneficiary holds valid nonimmigrant status permitting him to work at the Institute, and that status is independent of the outcome of the present petition. Denial of the petition or dismissal of the appeal will not void his nonimmigrant status or compel the immediate termination of his employment.

Counsel protests that “the third prong [of the national interest test in *Matter of New York State Dept. of Transportation*] . . . is really not well set out in the opinion.” We acknowledge that the precedent decision lacks firm, objective guidelines in this regard. This is largely because, as noted in the decision itself, neither the statute nor regulations relating to the waiver provide any guidance whatsoever as to what is considered to be in the national interest. The phrase “national interest” is simply set forth as though its meaning were self-evident, which it is not. A precedent decision is limited in its ability to conjure specificity out of vagueness.

That being said, *Matter of New York State Dept. of Transportation* is clear on a number of relevant points. At several points in that decision, such as pages 215 and 221, the decision indicates that simply possessing the necessary training for a given position is not grounds for a waiver, regardless of how narrow or specialized that training may be, because the labor certification process exists to test the availability of trained U.S. workers. Page 219 of that decision specifies that expectations of what the alien will one day accomplish must be supported by the alien’s prior track record. In the present proceeding, the beneficiary’s track record does not show any involvement in murine surgery, or medical research of any kind, prior to working for the Institute. If the beneficiary had such a track record, the record does not reflect it. His past work described in the record involved genetic research in sponges and fossils. The eclectic nature of the beneficiary’s past work and training is hardly a sure sign that the beneficiary’s work at the Institute would continue several years into the future.

Witnesses have asserted that it would take a new worker at least two years to become competent at performing TBI surgery on mice; but when the petitioner filed the petition, the beneficiary had only worked for the petitioner for two years and was considered not only competent, but an irreplaceable expert who was seen as qualified to train others in the procedure. (This is assuming that the beneficiary participated in this activity throughout his time at the Institute, when the record indicates that he has engaged in at least three very different projects there.) The available evidence strongly suggests that the

methods used by the beneficiary take considerably less than two years to master, unless very significant segments of the beneficiary's past training and experience have been omitted from the record.

The petitioner has pointed out the beneficiary's co-authorship of a number of scholarly articles. The record is silent as to how researchers outside of the Roskamp Institute have responded to this work. The director specifically requested documentation to show citation of the petitioner's published work; the petitioner's response contained no such evidence.

Counsel attempts to distinguish the beneficiary in this proceeding from the beneficiary in *Matter of New York State Dept. of Transportation*, who was an engineer involved in the construction of bridges. Counsel does this by citing statistics relating to TBI, without citing contrasting statistics to show what effect the beneficiary's work to date has already had in that important area of research. The petitioner has not shown that the beneficiary is an accomplished TBI researcher. The petitioner has shown only that the beneficiary is a valued participant in a project that may take decades to bear fruit. It cannot suffice to assert that the beneficiary must receive a waiver now, in order to accumulate, over many years, a track record that would retroactively justify the waiver.

Even then, by consistently focusing on the beneficiary's expertise in laboratory methods and preparation of materials, the petitioner has essentially portrayed the beneficiary as more of a laboratory technician than a researcher in his own right. The petitioner claimed, on Form I-140, that the beneficiary's position is permanent, but the record shows several indications that the beneficiary's research associate position is essentially a short-term training assignment. Not the least of these indications is the beneficiary's stated intention of pursuing a higher degree, indicating that the beneficiary himself considers his training and education to be incomplete.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.